

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

DEC 17 2007

COURT OF APPEALS
DIVISION TWO

MICHAEL GOODMAN,

Plaintiff/Appellant,

v.

CITY OF TUCSON, a municipal
corporation; WALTER TELLEZ, Tucson
Zoning Administrator; and CITY OF
TUCSON BOARD OF ADJUSTMENT,
as officials acting for the City of Tucson,

Defendants/Appellees.

2 CA-CV 2007-0057
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20064613

Honorable Michael O. Miller, Judge

REVERSED AND REMANDED

Thompson-Krone, P.L.C.

By Russell E. Krone

Tucson

and

Michael Aaron Harwin, P.C.

By Michael Aaron Harwin

Tucson

Attorneys for Plaintiff/Appellant

Michael G. Rankin, Tucson City Attorney

By Viola Romero-Wright

Tucson

Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 Appellant Michael Goodman appeals from a judgment of the Pima County Superior Court affirming a decision of the City of Tucson Board of Adjustment (the Board). The decision upheld a determination of the City’s Zoning Administrator revoking building permits on real property Goodman was developing. Goodman argues that both the Board and the superior court abused their discretion in failing to address his vested rights in the permits. He also argues that appellee City of Tucson (the City) failed to follow its own ordinances, regulations, and procedures in revoking the permits. For the following reasons, we reverse the judgment of the superior court and remand this matter to the Board of Adjustment for proceedings consistent with this decision.

Facts and Procedural Background

¶2 This case involves the development of eight contiguous parcels of property located at Fourth Avenue and Elm Street in Tucson (the property).¹ Goodman purchased the property, formerly the site of a municipal water tower, from the City in or around 1993. At that time, the property was divided into ten long, narrow parcels. In August 2003, the City authorized a reconfiguration of the property into the current eight parcels, approved individual development plans for each of the parcels, and issued Goodman building permits for six of the parcels. Goodman subsequently began work on at least two of these parcels.

¹The properties are: 420 East Elm Street (Block 27, Tucson Heights, Parcel No. 115-02-479E); 426 East Elm Street (Parcel No. 115-02-479D); 1685 North Third Avenue (Parcel No. 115-02-479C); 1655 North Third Avenue (Parcel No. 115-02-479L); 1611 North Third Avenue (Parcel No. 115-02-479G); 451 East Lee Street (Parcel No. 115-02-479M); 427 East Lee Street (Parcel No. 115-02-479J); and 417 East Lee Street (Parcel No. 115-02-479H).

¶3 In August 2005, Goodman approached the Department of Development Services to inquire whether the City would consider amending his development plans to allow access to several of the parcels through an existing City easement that cuts through the middle of the property. In the course of their discussion, Goodman provided a map of the entire property showing the modifications he was requesting. Following an inspection of the site, the Department issued deficiency notices to Goodman later that month requiring him to develop a storm water pollution prevention plan (SWPPP) for the property and submit a Notice of Intent (NOI) to the Arizona Department of Environmental Quality. The deficiency notices were apparently based on the premise that Goodman was in fact developing the property as a single project, which exceeded one acre and was therefore subject to these requirements. Goodman initially had not been required to submit a SWPPP or NOI in the process of applying for his building permits, because the areas of the individual parcels had not been large enough to trigger this requirement. He therefore did not respond to these deficiency notices and was subsequently cited for a civil violation. At a hearing before the City Court on January 3, 2006,² Goodman entered a plea of responsible to the violation and was fined two hundred dollars. On the advice of the City building inspector who had issued the deficiency notices and who attended the hearing, the court also ordered Goodman to submit a site plan and grading plan for the entire property, which he apparently did.

²*City of Tucson v. Michael Goodman*, CO-5084812.

¶4 On January 19, 2006, the Development Services Department issued a stop work order on the project. This order cited inconsistencies between the approved individual site plans and the map submitted pursuant to the City Court hearing, which showed the entire property and reflected how the City believed construction was actually proceeding as a unified project. Goodman appealed this order to the City's Building Official. The Building Official upheld the order, and Goodman was initially informed he could appeal this decision to the Board of Appeals. However, the Building Official subsequently notified Goodman that the determination that the property was being developed as a single site was a zoning issue that should be appealed to the Board of Adjustment.

¶5 On February 27, 2006, the City's Zoning Administrator wrote to Goodman, advising him that, based on the map he had submitted pursuant to the proceedings in City Court and on the actual grading of the parcels, the City had determined that his development was a unified project. The Zoning Administrator further informed him that because of this determination he was required to submit a unified site plan for approval, and "the [building] permits that were previously issued are in error and no longer in effect."

¶6 Goodman appealed the Zoning Administrator's decision to the Board of Adjustment, which considered his appeal at two public hearings on June 28 and July 26, 2006. After hearing testimony from Goodman and City officials, as well as comments from members of the public, the Board upheld the decision. On August 24, 2006, Goodman sought review of the Board's decision by Pima County Superior Court in a special action.

After oral argument, the superior court affirmed the Board of Adjustment's decision. This appeal followed; we have jurisdiction under A.R.S. § 12-2101(B).

Standard of Review

¶7 In reviewing the superior court's ruling, we are entitled to independently examine the record "and we may substitute our opinion for that of the superior court since we are reviewing the same record." *Arkules v. Board of Adjustment*, 151 Ariz. 438, 441, 728 P.2d 657, 660 (App. 1986). But we will not disturb a decision by a board of adjustment on appeal unless we find there was not enough evidence to support the board's decision and conclude, therefore, it acted arbitrarily, capriciously, and abused its discretion. *Austin Shea (Arizona) 7th Street and Van Buren, L.L.C. v. City of Phoenix*, 213 Ariz. 385, ¶ 29, 142 P.3d 693, 700 (App. 2006). Nor may we substitute our judgment for that of the board on factual questions, even when the question is "debatable and one in which [this] court would have reached a different conclusion had it been the original arbiter of the issues.'" *Mueller v. City of Phoenix*, 102 Ariz. 575, 581, 435 P.2d 472, 478 (1967), quoting A. Rathkopf, *The Law of Zoning and Planning*, ch. 51 at 1. As to issues of law, such as the interpretation of ordinances, "we are free to draw our own legal conclusions and are not limited to the review standard of arbitrary, capricious or abuse of discretion." *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989).

Discussion

¶8 First, Goodman argues the Board abused its discretion by not addressing any vested rights he may have in his existing development plans and building permits. "[W]here

a special use or building permit has been legitimately issued and the permittee has substantially relied thereupon and incurred considerable expenses, the right to continue construction under such permit becomes a vested right.” *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 608, 557 P.2d 532, 540 (1976). Our supreme court has stated that a board of adjustment has “jurisdiction and authority to hear and determine an issue concerning vested rights” when such an issue is raised. *Neal v. City of Kingman*, 169 Ariz. 133, 136, 817 P.2d 937, 940 (1991). Further, by statute, “[a] board of adjustment shall . . . [r]everse or affirm, wholly or partly, or modify the order, requirement or decision of the zoning administrator appealed from, and make such order, requirement, decision or determination *as necessary*.” A.R.S. § 9-462.06(G)(3) (emphasis added).

¶9 Here, it is undisputed that the City approved development plans and issued building permits to Goodman and that at least some of these permits were still valid at the time the Zoning Administrator ruled “the permits that were previously issued are in error and no longer in effect.” Goodman claims to have spent approximately \$250,000 in reliance on these permits. Goodman raised the issue of his vested rights in his appeal to the Board and again in the special action before the Pima County Superior Court. The City’s Staff Report, prepared for the Board’s first hearing, acknowledged the following as the issues raised by Goodman in his appeal:

1. Did the City of Tucson violate Mr. Goodman’s vested rights to develop his property pursuant to approved and issued building permits?
2. Was the Zoning Administrator’s Determination Arbitrary and Capricious?

3. Is the City of Tucson estopped from asserting that Mr. Goodman's project is a unified eight lot residential development plan that is to be represented by a single site plan?

And, the City's Deputy Director of Development Services testified at that hearing that the Land Use Code had been changed since Goodman's permits had been issued, that if he were to resubmit his plans he would have to "completely revise" them, and that Goodman might raise the issue of whether he had vested rights to construct under the original plans.

¶10 However, consistent with the City's position at the second hearing, the Board ultimately declined to address the issue of Goodman's vested rights. Following the first hearing, the City's attorneys circulated a Memorandum to the Board, advising that there was "only one issue before the Board . . . [w]hether to uphold or reverse the Zoning Administrator's determination that the site plan submitted in August, 2005 . . . represents a unified single-lot residential development for the purpose of applying [the Land Use Code] and city code requirements?"³ This memorandum also advised the Board that Goodman's "vested rights and arbitrary and capricious arguments are not applicable here." And at the subsequent hearing, the Zoning Administrator testified to the Board that the issue of vested rights "[is] not before you."

¶11 To support its contention that vested rights were not at issue, the City relies on an apparently circular argument that "[s]ince there has been no zoning approval for how the site will be developed [as a unified project], no permits can be based upon the new plan,

³The record does not clarify whether this Memorandum, like the Staff Report, was intended as advice from a City department to the Board or whether it was part of the adversarial process. If the latter, Goodman does not appear to have been given either a copy or an opportunity to respond prior to the second hearing.

and the new plan cannot serve as the basis for any vested rights or estoppel claim due to the lack of any permits.” This argument fails to acknowledge that one of the Zoning Administrator’s actions was to revoke Goodman’s *existing* permits. However, the superior court was apparently persuaded by the argument because it found “no evidence from which [it could] conclude that the Zoning Administrator or the Board attempted to adjudicate or determine [Goodman]’s vested rights.” Thus, it concluded “the issue [was] not properly before it” and could “be addressed in a subsequent proceeding or a different forum.” We agree the Board did not attempt to address the issue. However, the Zoning Administrator revoked Goodman’s otherwise valid permits and therefore disposed of any vested rights he had in those permits. Because a determination of Goodman’s vested rights was thus a necessary element of any adjudication of the Zoning Administrator’s determination, the Board abused its discretion in failing to address the issue. *See* A.R.S. § 9-462.06(G)(3); *Ethridge v. Ariz. State Bd. of Nursing*, 165 Ariz. 97, 100, 796 P.2d 899, 902 (App. 1989) (unreasoned action without consideration and in disregard of facts and circumstances constitutes abuse of discretion).

¶12 Second, Goodman argues the Zoning Administrator and the Board should not have considered his site map and other submittals, to comply with the SWPPP requirement, as a unified plan (the “2005 submittal”).⁴ Alternatively, he contends that the appropriate

⁴Although the City contends that Goodman failed to raise this issue below, we disagree. At the Board of Adjustment and in superior court, Goodman argued that “there never was a 2005 submittal” and that the City had erred by relying on the “2005 plan” as evidence that he was developing the site as a single project. Similarly, Goodman raised the issue of the Zoning Administrator’s authority below, arguing at the first Board hearing that

sanction for any failure to develop his property according to his 2003 approved plans was to cite him for any violations, not to revoke his existing permits.⁵

¶13 It is undisputed that Goodman never formally filed the “2005 submittal,” showing all eight parcels of the property as a unified development, under the development plan approval process set forth in the Tucson City Code and Land Use Code. Instead, the matter apparently reached the Zoning Administrator either via Goodman’s August 2005 discussions with the Department of Development Services over the possible use of a City easement for roadway access to some of the parcels or as a result of being submitted pursuant to the City Court’s order at the January 2006 hearing on Goodman’s SWPPP and NOI violations. As Goodman’s counsel pointed out during oral argument, the “2005 submittal” included a “site map” which merely addressed the SWPPP requirements; it did not, however, include a more comprehensive “site plan” that is required under the development plan approval process.

¶14 We therefore question whether it was appropriate for the Board to accord much, if any, weight to the proposed “2005 submittal” as evidence that the property was actually being developed as a unified project, in violation of Goodman’s approved

the Zoning Administrator had “overstepped his bounds.”

⁵The superior court believed that Goodman “[did] not contend that the Zoning Administrator applied incorrect law.” It was mistaken. In fact, Goodman argued that “the Zoning Administrator failed to follow the procedures set forth in the Tucson Code and the Land Use Code.”

development plans and building permits.⁶ However, we may not weigh the evidence or substitute our judgment for that of the Board. *Havasut Heights Ranch and Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990); *Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988). In addition, the City introduced evidence, including the testimony of a City engineer, that Goodman was grading and digging trenches across multiple parcels.⁷ Although Goodman produced contrary evidence, there was sufficient evidence for the Board to conclude that Goodman had begun to develop the site as a single project. *See Ethridge*, 165 Ariz. at 100-01, 796 P.2d at 902-03 (when there is room for two opinions, appellate court may not find an agency's conclusion arbitrary or capricious if made upon due consideration of the evidence, even if appellate court would have reached a different conclusion). However, the City failed to provide any legal basis for its contention that under the City's own ordinances, rules or regulations, the Zoning Administrator was empowered to revoke Goodman's existing permits merely because Goodman was arguably developing the site as a unified project.

¶15 We give great weight to the interpretation of an ordinance by an administrative body charged with the duty of enforcing it. *Kubby v. Hammond*, 68 Ariz. 17, 22, 198 P.2d

⁶Because we find the Board did not consider Goodman's vested rights, we do not address whether the "2005 submittal" constituted credible evidence in support of the proposition that, in Goodman's words, "a businessman [with] approved and valuable building permits [had] voluntarily abandon[ed] those permits in exchange for a speculative hope that a new plan would be approved."

⁷The Zoning Administrator similarly relied on such site evidence as well as the "2005 submittal." We therefore find that the plan was not essential to his determination, and need not decide whether he should have considered it.

134, 138 (1948). However, we may substitute our judgment for any administrative conclusions regarding the legal effect of its factual findings. *Gardiner v. Ariz. Dep't. of Econ. Sec.*, 127 Ariz. 603, 606, 623 P.2d 33, 36 (App. 1980). Furthermore, the Zoning Administrator's authority is statutorily limited to "enforcement of the zoning ordinance." A.R.S. § 9-462(A)(4); *Aegis of Arizona, L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 32, 81 P.3d 1016, 1024 (App. 2003). A board of adjustment's power is similarly "restricted to that granted by the zoning ordinance in accordance with the statute." *Arkules v. Board of Adjustment*, 151 Ariz. 438, 440, 728 P.2d 657, 659 (App. 1986).

¶16 In *Arkules*, a board of adjustment granted a variance to a property owner from a regulation requiring his house to blend in with the surrounding mountain scenery. *Id.* at 439, 728 P.2d at 658. In a special action, the superior court in that case found the board had not abused its discretion in granting the variance. *Id.* However, Division One of this court concluded the board's decision lacked a legal basis because it violated both the board's own rules and regulations and the relevant statute. *Id.* at 442, 728 P.2d at 661. Finding that the minutes of the board's hearing were "insufficient to grant the Board authority to permit the variance," and that there was "no evidence before the Board to support any lawful reason for the exercise of its power," Division One reversed the judgment of the superior court. *Id.* at 441-42, 728 P.2d at 660-61.

¶17 We similarly find no valid legal basis for the Zoning Administrator's revocation of Goodman's permits and thus for the Board of Adjustment's decision upholding his action. The City's Staff Report to the Board included recitations of the section numbers of the

Tucson City Code establishing the Zoning Administrator’s general powers, and on appeal the City has quoted relevant sections of the Tucson City Code and Land Use Code authorizing the Zoning Administrator to “monitor and assure compliance with plans approved for zoning compliance” and to “serv[e] written notice to [an] owner to cease or correct [a] violation.” However, at no point in any of the proceedings has the City cited any provision establishing the Zoning Administrator’s lawful authority to summarily revoke existing building permits.⁸ Accordingly, the Board had no legal basis on which to conclude that the Zoning Administrator had any such authority. *See Arkules*, 151 Ariz. at 442, 728 P.2d at 661; *see also Cavco Indus. v. Indus. Comm’n*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981) (reviewing court may find inadequate findings fatal if unable to determine whether basis for administrative conclusion was legally sound). Furthermore, the Zoning Administrator’s legal authority was an issue necessary to the Board’s adjudication of his revocation of Goodman’s permits. *See* A.R.S. § 9-462.06(G)(3). The Board therefore abused its authority in upholding the Zoning Administrator’s determination.

Conclusion

¶18 We thus conclude that there was no legal basis to support the Board of Adjustment’s decision to uphold the Zoning Administrator’s determination. *See Town of*

⁸During oral argument the City’s attorney cited a “catch-all” provision in the City of Tucson Land Use Code, § 5.5.3.2(F), as authority for the zoning administrator’s decision implicitly revoking Goodman’s building permits. We reject this argument. This provision authorizes the Zoning Administrator to take action to “assure compliance,” but does not grant authority to summarily revoke building permits. Indeed, as Goodman’s attorney pointed out, such revocation makes “compliance” impossible.

Paradise Valley v. Gulf Leisure Corp., 27 Ariz. App. 600, 602, 611, 557 P.2d 532, 534, 543 (1976) (upholding trial court's finding that actions of municipality in violation of its own ordinances were void; recognizing judicial power to order municipality to allow construction under previously issued building permits). For the reasons stated above, we reverse the judgment of the superior court and direct that court to enter an order remanding this matter to the Board of Adjustment to vacate the Zoning Administrator's February 27, 2006, determination, to the extent it found Goodman's previously approved building permits and site plans to no longer be in effect.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge